

Issue: Group II Written Notice (client neglect); Hearing Date: 09/30/13; Decision Issued: 10/11/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No.10177; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10177

Hearing Date: September 30, 2013
Decision Issued: October 11, 2013

PROCEDURAL HISTORY

On May 6, 2013, Grievant was issued a Group II Written Notice of disciplinary action for client neglect.

On June 5, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 10, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 30, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employs Grievant as a Forensic Mental Health Technician at one of its facilities. The purpose of her position was:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensic/civil setting to maintain a safe, clean and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.¹

Grievant had prior active disciplinary action. On December 15, 2011, Grievant received a Group I Written Notice for unsatisfactory work performance.

The Patient had an Axis I diagnosis of Schizoaffective Disorder and Polysubstance Abuse. He resided at the Facility where Grievant worked.

The Facility dayroom is connected to a hallway. Patient rooms are located on the hallway. Doors to the patients' rooms are locked and must be unlocked from the outside.

¹ Agency Exhibit 6.

On April 8, 2013, Grievant was working in the dayroom with another employee supervising patients. She gave five patients clothing and told them they could take the clothing to their rooms. Grievant walked down the hallway where the rooms were located. As she walked past each patient's room she would unlock and open the door so the patient could go inside the room. The Patient was not one of the patients receiving clothing and Grievant did not expect him to go to his room. As the patients went to their rooms, the Patient walked behind his roommate who had received clothing and entered into their room. Because Grievant was walking in front of the patients, she did not see the Patient follow his roommate into the room. She walked to the end of the hallway and waited for the patients to come out of their rooms. As she approached the Patient's room, she observed the Patient's roommate exit the room and close the door. She assumed that no one else was in the room and continued walking towards the dayroom. The Patient remained in the room while the other patients and Grievant were in the dayroom. His absence was discovered when the oncoming shift supervisor conducted a head count and noted that one patient was missing. The Patient was found in his room and had been missing for approximately 30 minutes.

The Chief Nursing Executive testified that Grievant should have known the number of patients walking down the hall by counting them as they passed the threshold from the dayroom to the hallway.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[N]eglect of clients" is a Group III offense.³ Departmental Instruction 201 defines neglect as:

This means the failure by a person, program, or facility operated, licensed, or funded by the department, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

Policy P-7 provides that, “[s]taff will be aware [of] the whereabouts of assigned patients at all times.”

Grievant was responsible for the safety of patients by supervising them. In order to supervise patients, Grievant had to know the location of each patient. On April 8, 2013, Grievant did not know the whereabouts of the Patient for approximately 30 minutes. The Agency has established that Grievant failed to ensure the Patient’s safety thereby justifying the Agency’s allegation of neglect. The Agency mitigated the disciplinary action to a Group II Written Notice. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that if the oncoming shift had reported to the dayroom on time, the amount of time for which the Patient was unaccounted would have been no more than 15 minutes. If the Hearing Officer assumes for the sake of argument that this is true, the evidence showed that failing to observe a patient for only 15 minutes would be sufficient to establish the Agency’s allegation of neglect.

Grievant asserted that she did not intend to disregard the Patient’s whereabouts. It is not necessary for the Agency to show that an employee’s neglect was purposeful or intentional.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because the Agency inconsistently applied disciplinary action. Grievant presented as an example another employee who failed to observe a patient but the employee did not receive a Group II Written Notice. The other employee was a probationary employee and, thus, not similarly situated with Grievant. The probationary employee was not subject to the Standards of Conduct and was not subject to receiving a Written Notice. The Agency took disciplinary action against the employee by extending his probationary period for six months. The Agency’s application of disciplinary action was not inconsistent.

⁴ *Va. Code § 2.2-3005.*

Grievant argued that the disciplinary action should be mitigated because it was too severe under the circumstances. Once the Agency has met its *prima facie* case, the Hearing Officer can mitigate the disciplinary action only if it exceeds the limits of reasonableness. The level of discipline chosen by the Agency does not exceed the limits of reasonableness under the facts of this case.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

Or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.